Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Mary O'Grady, Wall Street Journal	)	FOIA Control No. 2008-074
	)	
On Request for Inspection of Records	)	
	)	
	)	
Fusion Telecommunications International, Inc.	)	
	)	
On Request for Confidential Treatment	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 2008 **Released: September 24, 2008**

By the Commission:

1. By this order, we deny an application for review filed by Fusion Telecommunications, International, Inc. (Fusion),[1] of a ruling by the International Bureau (IB)[2] granting a Freedom of Information Act (FOIA) request by Mary O'Grady (O'Grady), a reporter for the Wall Street Journal,[3] and denying a request for confidentiality filed by Fusion.[4]

I. BACKGROUND

2. O'Grady's FOIA Request sought "All International Telecommunications Agreements entered into by Fusion and Telecommunications d'Haiti (Teleco) between December 19, 1997 and November 4, 2004."[5] IB located in its files an agreement between Fusion and Telecommunications d'Haiti S.A.M, dated August 19, 1999 (Agreement).[6] The copy of the

[1] Application for Review, filed March 12, 2008, by Fusion Telecommunications International, Inc. (AFR).

[2] Letter from Helen Domenici, Chief, International Bureau, to Ms. Mary O'Grady and Mr. James M. Smith (Feb. 27, 2008) (Ruling).

[3] Fax submission from Mary O'Grady (Nov. 14, 2007) (FOIA Request).

[4] Letter from James M. Smith to Helen Domenici (Jul. 20, 2007).

[5] FOIA Request at 3 .

[6] Ruling at 1.

Agreement found in IB's files had been submitted by Fusion on July 20, 2007, in response to a request by IB that Fusion file any such agreements.[7] Fusion's submission was accompanied by a request for confidential treatment pursuant to 47 C.F.R. § 0.459. IB's Ruling denied Fusion's request for confidential treatment and held that the Agreement would be released to O'Grady.[8]

3. IB found that at the time the Agreement was executed, the carriers serving the U.S.-Haiti route were covered by the Commission's International Settlements Policy (ISP)[9] and were required to file copies of relevant contracts within 30 days of execution pursuant to 47 C.F.R. § 43.51.[10] Contracts within the scope of the ISP were then and are now routinely available for public inspection.[11] IB held that because the Agreement was executed in 1999 and the U.S.-Haiti route was not exempted from the ISP until November 4, 2004, Fusion was not entitled to seek confidential treatment sometimes accorded agreements not covered by the ISP.[12] Moreover, IB held that although Fusion submitted a copy of the Agreement in 2007 in response to an IB request, the Agreement would not be deemed to have been voluntarily submitted at that time.[13] IB stated:

> The fact that Fusion did not submit the Agreement entered into on August 19, 1999, as required by Commission rule, until 2007 does not change the fact that it had an obligation in 1999 to file the Agreement within 30 days of execution. Since the International Bureau had to request the information, we do not regard

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[7] *Id. See* Letter from James M. Smith to Ms. Helen Domenici (July 20, 2007), *responding to* Letter from Helen Domenici, Chief, International Bureau (May 15, 2007).

[8] Ruling at 6. Confidential commercial or financial material is exempt from disclosure under the FOIA pursuant to FOIA Exemption 4. *See* 5 U.S.C. § 552(b)(4) (exempting from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

[9] The ISP regulates the accounting rates applicable to U.S. and foreign carriers. *See* 47 C.F.R. § 64.1002. The Commission established the ISP to prevent foreign carriers with market power from discriminating or using threats of discrimination or other anticompetitive actions against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic. *See* Ruling at 3 n.20.

[10] Ruling at 1-2.

[11] International settlement agreements filed with the Commission are maintained by IB and are routinely available unless excluded from routine public inspection by another provision of the rules. 47 C.F.R. §§ 0.453(e), 0.453(l)(5). Under 47 C.F.R. § 43.51(f)(1), carriers providing service on international routes exempt from the ISP may seek confidential treatment for the terms of the agreement (to the extent they are required to be filed), but the rules provide no similar opportunity to seek confidential treatment for agreements subject to the ISP. Thus, in 1999 and at present, agreements subject to the ISP are routinely available for public inspection.

[12] Ruling at 3-4.

[13] *Id.* at 5. Material submitted voluntarily may be deemed confidential if the submitter does not customarily release such information to the public, whereas material involuntarily submitted may be deemed confidential only if disclosure would cause competitive harm or impair the government's ability to obtain such information. *See Critical Mass Energy Project v. NRC,* 975 F.2d 871, 878-79 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 984 (1993). We agree with IB that because the filing of the Agreement was required by 47 C.F.R. § 43.51 at the time the Agreement was executed, the submission of the Agreement, including the submission of a copy in 2007 at the request of the Commission, was not voluntary.

Fusion's submission of the Agreement in 2007 in response to the Bureau letter as voluntary.[14]

4. In its application for review, Fusion contends that the Agreement should be treated as confidential because it contains sensitive contractual and operational information such as pricing, disclosure of which could cause competitive harm to Fusion.[15] Fusion disagrees with IB's finding that the Agreement was not filed until 2007, since it believes that its management would have ensured filing in 1999.[16] Fusion acknowledges that the Agreement would not have been entitled to confidential treatment at the time it was executed in 1999.[17] Nevertheless, Fusion argues that it would be illogical not to apply here the current policy that the U.S.-Haiti route is exempt from the ISP and thus eligible for confidential treatment of telecommunications agreements. Fusion observes that in 2004, the Commission abolished in most cases the requirement for filing contracts for routes exempt from the ISP, finding that such filings unnecessarily restricted U.S. carriers in their negotiations.[18] According to Fusion, there is no reason to apply an "outmoded, discarded" policy today and to ignore the strong public policy favoring nondisclosure that the Commission now recognizes, even though the U.S.-Haiti route was not exempted from the ISP until November 2004.[19]

5. O'Grady responds[20] that exemption of the U.S- Haiti route from the ISP and the consequent changes in filing requirements were meant to apply only to new agreements and not to ones executed earlier. Moreover, O'Grady contends that the Commission should be permitted to reconstruct its apparently missing or incomplete Haiti File, especially in view of the fact that filing was mandatory and Fusion indicates that it filed the Agreement in 1999. Fusion's reply reiterated arguments that it previously made.[21]

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[14] Ruling at 5. IB ruled alternatively that even if the Agreement were eligible for confidential treatment, the Agreement was not confidential because the disclosure of information several years old would not cause competitive harm. *Id.* at 5-6.

[15] AFR at 2.

[16] *Id.* at 3. Fusion suggests that IB requested a copy of the Agreement because IB could not locate its "Haiti File." *Id.* at 3 n.7.

[17] *Id.* at 3, 5.

[18] *See* AFR at 4-5, *citing International Settlements Policy Reform; International Settlement Rates,* 19 FCC Rcd 5709, 5736 ¶ 58 (2004). Fusion further notes that in 1999, shortly before the Agreement was executed, the Commission changed its policy to permit the confidential filing of contracts for routes exempt from the ISP (unlike the U.S.-Haiti route at that time), because public disclosure might have a chilling effect on pro-competitive termination arrangements and might discourage parties from entering into arrangements that must be disclosed publicly. *See* AFR at 4, *citing 1998 Biennial Regulatory Review Reform in the International Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd 7963, 7989-90 ¶¶ 67, 69 (1999) (*1999 ISP Reform Order*). In Fusion's view, disclosure of the Agreement now would have a chilling effect, notwithstanding the fact that it was executed approximately eight years ago.

[19] AFR at 5.

[20] E-mail from Mary O'Grady to Clyde Ensslin (Mar. 17, 2008). O'Grady also disputes certain collateral arguments that are not material to our decision.

[21] Letter from James M. Smith to Laurence H. Schecker, Special Counsel, FCC Office of General Counsel (Apr. 1, 2008).

II. DISCUSSION

6. We agree with IB that the Agreement should not be deemed confidential. Every argument Fusion presents was adequately addressed by IB, and we agree with IB's determinations in full. We take this opportunity, however, to elaborate on the reasons why there has been no change in Commission policy that is of significance to this decision regarding the confidentiality of international settlement agreements and why the current status of the U.S.-Haiti route has no bearing on the question of whether the Agreement should be disclosed in response to a FOIA request.

7. There is no dispute that at the time the Agreement was executed in 1999, Commission policy treated it as a public document by virtue of the fact that the U.S.-Haiti route was subject to the ISP.[22] Thus, accepting *arguendo* Fusion's assertion that it timely filed the Agreement as required in 1999,[23] the Agreement was routinely available to the public at that time. Once the Agreement was in the public domain, it remained so and cannot now be treated as confidential under FOIA Exemption 4.[24] Further, because the Agreement has been in the public domain since its asserted filing in 1999, there can be no competitive harm to Fusion by virtue of its release in response to a FOIA request.[25] Thus, there is no justification for treating the Agreement as confidential now, assuming that the Agreement was in fact timely filed in 1999.

8. Moreover, we reject Fusion's contention that declining to treat the Agreement as confidential would apply an "outmoded, discarded" policy.[26] The applicable Commission rules and policy regarding whether settlements should be routinely available to the public has not changed since 1999. The Commission continues to balance the value of disclosing such contracts, *i.e.*, ensuring that they do not reflect terms that are detrimental to U.S. consumers, against the possibility that disclosure would have a chilling effect on the negotiation of pro-competitive arrangements.[27] The Commission's calibration of this balance is reflected by its determination of whether a particular route is subject to the ISP. If it is, the Commission has determined that the risk of anti-competitive harm to U.S. competitors and customers from

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[22] Accordingly, contrary to Fusion's claims, *see* AFR at 5, the Agreement falls within the class of documents routinely available for public inspection, *see* 47 C.F.R. § 0.453(e), and not within the class of documents for which a carrier may seek confidential treatment pursuant to 47 C.F.R. §§ 0.453 and 43.51(f).

[23] AFR at 3 ("Contrary to the statement in the Bureau's Letter Ruling, [footnote omitted], Fusion's current management believes that during the period in question Fusion had the structure and procedures in place to assure full compliance with the Commission's ISP rules and that Fusion complied with its filing obligations.").

[24] *See CNA Financial Corp. v. Donovan,* 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality--a *sine qua non* of Exemption 4.").

[25] *See id*. at 1154 n.154, quoting *Worthington Compressors, Inc. v. Costle,* 662 F.2d 45, 51 (D.C. Cir. 1981) ("If the information is freely or cheaply available from other sources . . . , it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm to the submitter.").

[26] AFR at 5.

[27] *See 1999 ISP Reform Order,* 14 FCC Rcd at 7989-90 ¶ 69.

nondisclosure of an international settlement agreement outweighs the benefits of a more deregulatory approach to what might otherwise be classified as a non-ISP route.[28] In this case, the U.S.-Haiti route was unquestionably subject to the ISP at the time the Agreement was executed and was supposed to be filed. Thus, the only question is whether the determination in 2004 that the U.S.-Haiti route should no longer be subject to the ISP should be applied retroactively to change the public domain status of a contract executed and required to be made routinely available to the public five years earlier.

9. We find that Fusion's suggestion that the current treatment of the U.S.-Haiti route should be applied retroactively to a contract executed in 1999 does not overcome the presumption against giving retroactive effect to administrative rules.[29] This presumption rests in part on the principle that "settled expectations should not be lightly disrupted."[30] In this case, O'Grady's FOIA request reflects the reasonable expectation that contracts regarding the U.S.-Haiti route entered into before November 4, 2004 would be on file and routinely available to the public. Moreover, if we were to accept Fusion's assertion that it did in fact file the Agreement in 1999, that would mean that for over five years the contract was routinely available to the public and Fusion had no reason to expect that it would be treated confidentially. The presumption against retroactivity also rests on the principle that regulatory actions will not be given retroactive effect absent a clear intent to do so.[31] Here, the decision to exempt the U.S.-Haiti route from the ISP gave no indication that it was intended to have any retroactive effect. To the contrary, under standards newly adopted by the *2004 ISP Reform Order,* the U.S.-Haiti route qualified for prospective removal from the ISP because at least one U.S. carrier had then certified compliance with benchmark rates and no concerns had been raised in a public comment cycle.[32] The decision to exempt the U.S.-Haiti route did not address, much less alter, the competitive status of the route prior to that time. Thus, we find no indication that the Commission manifested any intent to retroactively change the public domain status of pre-existing international settlement contracts, including the 1999 Agreement.

III. ORDERING CLAUSE

10. IT IS ORDERED that Fusion Telecommunications International's application for review IS DENIED. If Fusion does not seek a judicial stay within ten (10) working days of the date of release of this decision, the records will be produced to O'Grady. *See* 47 C.F.R. § 0.461(i)(4).

[28] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5712 ¶ 5.

[29] *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, . . . administrative rules will not be construed to have retroactive effect unless their language requires this result").

[30] *See Landgraf v.USI Film Products*, 511 U.S. 244, 265 (1994).

[31] *Id.* at 270.

[32] *See Public Notice,* DA 04-3518 (IB Nov. 4, 2004) at 1-2.

11. The officials responsible for this action are the following Commissioners: Chairman Martin, Commissioners Copps, Adelstein, Tate, and McDowell.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary